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Supreme Court of the United States

GEORGE W. HUMPHREY, Warden, United States Penitentiary, Lewisburg, Pennsylvania,

Petitioner,

—*vs.*—

BERNARD W. SMITH.

No. 457, October Term, 1948

PETITION FOR REARGUMENT.

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The prevailing opinion in the above entitled proceeding decided April 25, 1949, was predicated largely on the decision of the case of *Floyd, CM 229477*. It will therefore be necessary to analyze this decision in order to point out the inconsistencies of that decision.

In the first instance the matter of *Floyd* expressly overruled the matter of *Clark, CM 161728*. The decision practically annulled Article of War 70 by declaring in substance that a pre-trial investigation was not jurisdictional. The *Floyd* case not only reversed well established and considered precedent by army courts martial and boards of review but practically annulled the statutory provision which was enacted by Congress in response to the demand of public opinion for protection of members of the service and

government against unnecessary and unjustifiable trials by court martial.

The arguments under the *Flood* case do not stand up under analysis. It presents an excellent array of all considerations tending to support its conclusions but ignores the opposite side of the picture. It is not a four-square judicial discussion of the question under consideration with recognition and unprejudiced evaluation of all of the various factors involved. It is the one-sided argument of an advocate seeking to sustain a preconceived proposition, marshalling only those matters favorable thereto and avoiding as far as practicable even the mention of anything adverse, citing authorities not in point and filling gaps in fact and logic with unwarranted assumptions and presumptions. For example, it fails to discuss or even mention any of the specific grounds upon which the overruled precedent opinions in the *Clark CM 161728; Keller, CM 182225;* and *Claybaugh, CM 183183* cases were based. True, the *Flood* opinion states that the holdings in the *Keller* and *Claybaugh* cases were not based on lack of jurisdiction but rather upon a theory that failure to comply with Article of War 70 was per se error, injuriously affecting the substantial rights of the accused, but as the Board in the *Flood* case remarked, the result is the same as in the *Clark* case and the reasoning of none of those three cases is disclosed.

The first point made in the *Flood* opinion in support of its conclusion that omission of pre-trial investigation pursuant to Article of War 70 does not affect jurisdiction is a statement that "the requirements for preference of charges and records of trial to staff judge advocates had theretofore been held to be directory only and to have no

effect on the legality of the proceeding." To that proposition the Board cited three prior opinions of the Board *CM 215720, Pool*; *CM 215721, Klobucker*, and *CM 224823, Greunebach*. Here again the *Floyd* opinion omits any statements on grounds of any of the cited opinions.

That a failure to refer charges to a staff judge advocate before ordering directed to trial was regarded as having at least some effect upon the legality of proceedings, is shown by the syllabus of *CM 224849*, where it was held that reference for trial by a service command order signed for the service commander by his staff judge advocate was insufficient to show compliance with Article of War 70.

It thus appears that the proposition to which the *Pool, Klobucker* and *Greunebach* cases are cited by the Board in the *Floyd* case is questionable. In fact, to the knowledge of the counsel for the defendant herein, Smith, none of these cases appear to have been published to the Service, which raises a still further and substantial doubt that they provide authentic support for the very important principles of military justice to which they are cited, for certainly those principles are such as should have been widely promulgated to all concerned with the administration of military justice. Those cases do not square with the provisions provided by the War Department's Technical Manual entitled "Military Justice Procedure, TM 27-225" and particularly par. 41, p. 37, which prescribes the duties of the A. W. 70 investigator in some detail as follows:

> "It is not the investigator's function to build up a case against the accused, but to ascertain and impartially weigh *all* facts in arriving at his final conclusions. He is required to conduct a thorough and impartial investigation" (A. W. 70). All available evidence should be exhausted. The investigating

officer is not limited to an examination of the witnesses and documentary evidence indicated on the charge sheet; he should extend his investigation as far as may be necessary to make it thorough."

And the same manual further prescribed (par. 42b, p. 38):

"b. At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, *and the names and substance of the testimony of all witnesses should be made known to him.*" (Emphasis ours.)

If these cases really do appear to provide such support as claimed by the War Department, then they must, in our opinion, be classified with the *Floyd* opinion itself, as being in the category of those opinions in which there has been a tendency to erroneously whittle away important statutory safeguards in order to serve what may have appeared to be the expediency of the moment.

In the *Floyd* opinion the Board further referred to the *Clark*, *Keller* and *Claybaugh* opinions aforesaid and declared that, although those cases had not been expressly overruled, opinions on analogous points indicated that the first three paragraphs of A. W. 70 had come to be regarded as directory only in all respects and that failure to comply therewith was not fatal error. Again these cases declared to represent that view and the Board cited a number of holdings which, with one exception, had not then and have not as yet, to the knowledge of counsel, been published to the service, the reasoning and grounds of which are not generally indicated and none of which in our opinion affords support for the proposition to which it is cited.

The first of the cases last mentioned is *CM 121586 (1918)* antedating the present Article of War by about two years, the syllabus of which indicates that the holding was substantially as stated by the Board in the *Floyd* opinion. That is, failure to swear a witness was not prejudicial error where the accused admitted the facts to which the witness had testified. Although Article of War 19 then as now expressly required that all persons giving evidence before a court martial be examined on oath or affirmation, that provision had to be read along with A. W. 37, which then as now expressly authorized reviewing authorities to disregard any error in the improper admission or rejection of evidence unless it should appear to have injuriously affected the substantial rights of the accused (MCM, 1917, App. 1, pp. 312-314) but the present test of A. W. 70 did not then exist, and there was no statutory requirement for pre-trial investigation such as now appears in mandatory terms in the second paragraph of that article. It should also be observed in that connection that A. W. 37 has no application to pre-trial procedure and affords no authority for disregarding a failure to comply with any requirement of A. W. 70. It follows, we think, that *CM 121586* gives no support whatever to the proposition to which it was cited in the *Floyd* opinion.

Next in support of that proposition the *Floyd* opinion cited *CM 172002, Nickerson*, where according to the citation it was held that a failure to sign or swear to the charges was non-prejudicial.

Failure of the accuser to sign or to swear to charges before their reference for trial by general court martial would, of course, be a definite violation of the plain terms of the first paragraph of A. W. 70, but it will be noted that that paragraph unlike the second and third paragraphs of

the article, does not expressly make compliance a condition precedent to reference for trial. In view of this important distinction the holdings in the *Nickerson* case can not logically be regarded as affording any substantial support for the conclusion reached in the *Floyd* case with regard to the second paragraph requirements.

The difference just noted between the language of the first paragraph of A. W. 70, on one hand, and that of the second and third paragraphs, on the other hand, furnishes convincing evidence that Congress in formulating that article deliberately distinguished in that way between those requirements of the article which the legislators intended to make outright jurisdictional conditions precedent to reference for trial and those which they may not have considered sufficiently vital in connection to warrant express provision for such treatment. The conclusion in the *Floyd* opinion would ignore that distinction and thus violate the well established rule that each part of the statute must be given its proper force and effect.

The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have even so presumed. (*Guaranty Title & T. Co. v. Title Guaranty & S. Co.*, 224 U. S. 152, 159-160; *Crawford v. Burke*, 195 U. S. 176, 190.) Under this rule where language is used in one section of a statute different from that used in another section of the same statute, it is to be presumed that the language is used with a different intent. (*Mine v. Commonwealth*, 301 Mass. 451, 17 N. E. (2d) 545, 548.)

With relation to the *Nickerson* case citation, the author of the opinion in the *Floyd* case departed from his usual course of silence as to the reasoning of cited opinions by

quoting part of the *Nickerson* opinion in language called "apt," reading as follows:

> "The provisions of A. W. 70 requiring the charge and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused."

The faults in such reasoning are so obvious as hardly to call for specific comment. It is of course true that the provisions of Article of War 70 were enacted in part for the benefit of the accused. So were many other provisions of the Articles of War which are in mandatory terms, and many of which have uniformly been held to be so. But it is equally true that those provisions were enacted for the benefit of the Government, to guard against the expense and other manifest disadvantages to the Government of unnecessary and unwarranted trials.

Furthermore, the right of an accused to know his accuser, is a fundamental and substantial right, expressly provided by law, and of great importance to both the accused and the Government in the administration of military justice. In our opinion it cannot legally be waived, but in any event, to hold that it can be waived by an accused by a mere failure to object, which might of course be due to ignorance or oversight, or by anything less than an express and definite declaration of the accused affirmatively shown by the record of trial, does violence both to the statute and the fundamental concepts of military justice. It would invite the

initiation of charges by anonymous accusers, by persons not legally eligible to so prefer charges, and persons unwilling to assume the proper responsibilities of accusers. It would facilitate the service of an undisclosed accuser as a member or official of the trial court. That these are among the very evils against which Article of War 70 was enacted, and to which the door will again be opened by failure to enforce the requirements of that Article, is apparent from the legislative history of the enactment, as outlined in our oral argument. We agree with the Board in the *Floyd* case, in its declaration that the reasoning in the *Nickerson* case applies with equal logic to the *Floyd* case; but we mean this in the sense that there is no sound logic in its application to either case.

Next after the *Nickerson* case, the *Floyd* opinion mentions *CM 201563, Davis*, where it was held that transmission of a report of pre-trial investigation by telephone, involved no violation of Article of War 70. The opinion is in the new compilation, and is correctly described in the *Floyd* case, but we can perceive no analogy between that holding and the proposition to which it is cited. The requirement that reports of pre-trial investigation be made in writing under certain conditions, is not in Article of War 70 or any other Article of War. It is merely a requirement of regulations.

Similar remarks apply to the *Godfrey* case citation (*CM 202511*), where if it is correctly described in the *Floyd* opinion, the holding apparently was simply that certain changes made in charges, by the staff judge advocate after pre-trial investigation, were not substantial and accordingly that the original pre-trial investigation constituted substantial compliance with Article of War 70. This is

manifestly quite different from, and provides no support for, the proposition that the Judge Advocate General had come to regard the pre-trial requirement as directory only.

And the last of the citations in support of that proposition was *CM 206697, Brown*. It is described in the *Floyd* opinion simply as "reference of charges to accuser for investigation," from which we infer that the holding was that such an error was not necessarily fatal. But here again the suggested analogy is absent, for Article of War 70 contains no express prohibition against such a reference, merely requiring that the investigation be impartial, and it is readily conceivable that a formal accuser might be capable of investigating his own charges impartially.

We must conclude that there is nothing substantial or authentic to support the secondary premise in the *Floyd* opinion, namely that although the *Clark*, *Keller* and *Claybaugh* opinions had not been expressly overruled, other opinions on analogous points indicated that the first three paragraphs of Article of War 70 had come to be regarded by the Office as directory only, and that failure to comply therewith was no longer regarded by the Office as fatal error.

In further support of its conclusion in the *Floyd* case, the Board next declared that that conclusion coincided with the apparent intention of the Congress in enacting the statute, which was, the Board asserted, "to prevent 'unnecessary and unjust trials' based 'on flimsy evidence without a prima facie case'," and cited certain Congressional Committee Reports of the 65th and 66th Sessions, and the Report of Special War Department Board on Courts-Martial and Their Procedure, dated July 17, 1919, disclosing parts of the legislative history of Article of War 70 as amended in 1920.

An examination of the entire legislative history of the enactment in question, and its language, will show that its ultimate full purpose was somewhat broader than indicated in the *Ex parte* opinion. It was clearly part of the ultimate purpose of Congress to prevent unnecessary and unjust trials by general courts-martial even where there might be a *prima facie* case. In other words, it is apparent that the Congress intended to give the accused in every such case a full pre-trial opportunity to meet and rebut a *prima facie* case.

More important in this connection, however, is the fact, obvious from the very language of the enactment as well as its legislative history, that the Congress thereby intended not merely to make provision under which those ultimate purposes *might* be achieved. War Department representatives were insisting that no new legislation was necessary at all in this connection, for the reason, as they contended, that the existing laws authorized all necessary action toward the desired ends and that those ends were already being effectively accomplished. However, there was then a strong popular demand for legislation that would more definitely assure attainment of those ends, some prominent proponents of such legislation even urging the radical extreme of complete withdrawal of court-martial jurisdiction and procedure from military command and control. The Congress decided on the middle course ultimately proposed by the War Department, and represented by the present text of the Article.

But, as above indicated, the Congress did not intend merely to declare or indicate its ultimate purposes of avoidance of unnecessary and unjust trials, leaving the measures for the accomplishment of its purposes to be devised and

pursued or ignored at the discretion of executive officials, but intended as far as practicable to assure their accomplishments by prescribing in mandatory terms, as statutory conditions precedent to the reference of charges to a general court-martial for trial, those specific measures deemed essential to the achievement of the desired ends.

It follows that the statement in the *Eloud* opinion that its conclusion (to the effect that the requirements of Article of War 70 for pre-trial investigation are not mandatory) coincides with the apparent Congressional intention in enacting the statute, as indicated by the pertinent legislative history, finds no support whatever in the documents expressly cited, or elsewhere; and is in fact completely erroneous.

Next in the *Eloud* opinion, the Board declares that the requirements of Article of War 70 are wholly procedural and do not affect the processes of courts-martial in their determination of guilt or innocence. We think the last clause of this proposition is a bit too broad, for certainly what transpires during a pre-trial investigation, particularly where the witnesses are thoroughly examined, and the accused is permitted to and does fully exercise his rights of cross-examination, may very vitally affect the proceedings of the court-martial at the trial. Disregarding that factor, we fail to perceive any proper relation between the statement and the question being considered. It is true that many procedural statutes are not regarded as mandatory or jurisdictional. But it is equally true that many are so regarded and treated. To classify Article of War 70 as procedural, as a means of supporting an argument that it is not mandatory or jurisdictional, is merely begging the question. No one will contend that the Congress lacks

power to make a procedural statute mandatory, or that it has done so in many instances. For examples, Articles of War 4, 5, 6, 8, 9, 10 and 11, may all be classed as procedural, in the same sense in which we presume that term is applied to Article 70 in the *Floyd* opinion, and certainly those prior Articles do not any more than Article 70 affect the processes of courts-martial in the determination of guilt or innocence; yet no one will argue that strict compliance with the provisions of each of those Articles is not mandatory and jurisdictional.

The Board's argument in the *Floyd* case proceeds with a declaration that although the language of a statute is mandatory, it may be regarded as directory if the legislative purpose can best be carried out by such a construction. This is perhaps a correct particularization of the basic rule that the legislative intent governs the construction of a statute. We do not challenge the soundness of the rule, but do challenge its applicability in support of a directory construction of the mandatory language of the second paragraph of Article of War 70.

There are other equally well established rules of statutory construction that must be taken into consideration. One is that a statute is to be construed according to the customary meaning of its words unless a different intent is clearly demonstrable. From this it necessarily follows that the proponent of a directory construction of a statute which is expressed in mandatory language, has the burden of showing in some convincing way the contrary legislative intent essential to the establishment of his proposition.

Neither in the *Floyd* opinion, nor in the present case, is any such showing made. The fact upon which the author of the *Floyd* opinion apparently relied, and upon which

opposing counsel in this case apparently rely, in support of their contention, is that the ultimate purpose of the enactment was to prevent unnecessary and unjust trials by general court martial. To draw any support for their contention from that fact, it would be necessary, under the very rule cited in the *Lloyd* opinion, to go further and demonstrate in some convincing way that the achievement of that purpose could be better and more certainly assured by construing the mandatory statute as only directory, or, in other words, by leaving compliance with the specific requirements of the statute more or less discretionary, and permitting the approval of sentences imposed after trials conducted without compliance with those requirements. Of course such a demonstration would be impossible, for it is too manifest that the best and surest way of assuring accomplishment of the purpose of Article of War 70 is to enforce its mandatory terms strictly and literally as they were enacted. Furthermore, as has already been pointed out, the legislative history of the measure proves with more than usual clarity that such enforcement was in fact the deliberate and well considered intent of the Congress.

The author of the *Lloyd* opinion next claims some support for his conclusion that the Congress did not mean what it said in Article of War 70, in certain cited opinions of the United States Supreme Court holding that some of the guarantees of the Fourth, Fifth and Sixth Amendments are in the nature of personal privileges that may be waived. We need not discuss or consider those rulings in detail in this connection, because of the obvious distinctions between those Federal Constitutional provisions, derived largely from, and construed largely according to the English common law, on the one side, and on the other, the second paragraph of our Article of War 70, with its

positively mandatory language, so enacted by the Congress under circumstances clearly indicating a deliberate legislative intent to make compliance with those requirements a statutory condition precedent to valid reference of charges for trial by general courts-martial.

We invite special attention to the language of the United States Supreme Court, speaking through Mr. Justice Sutherland in the *Patton* case (from which the *Floyd* opinion quotes other parts), where, after holding that the right of trial by jury under the English common law was, and therefore is under our Federal Constitution, likewise a matter of personal privilege subject to waiver, the Court was careful to add (*Patton v. United States*, 281 U. S. 276, 312):

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. * * * Not only must the right of the accused to trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of the government counsel and the sanction of the court must be had, in addition to the intelligent consent of the defendant.* And the duty of the court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in

degree as the offenses dealt with increase in gravity." (Emphasis ours.)

And it should be noted in the same connection that nowhere in the Articles of War, or in the Manual for Courts-Martial, is there any provision, express or implied, authorizing an accused or a trial judge advocate, to waive the pre-trial investigation required by Article of War 70, or authorizing any court martial to accept such a waiver.

Finally in the *Flood* opinion, after announcing a ruling in that case conforming to the conclusion previously stated, that the pre-trial investigation requirement was not jurisdictional, and further holding that the failure to comply therewith in that case did not injuriously affect the substantial rights of the accused there, the Board quoted from what it styled "a penetrating review by the staff judge advocate in the Brown case" (supra), as follows:

> "If * * * a thorough and impartial investigation is not had, (and) nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical WRONG WHICH DID HIM NO HARM. The law ought not to admit that a guilty man is barred if tried, convicted and sentenced; and if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been found guilty. The case therefore falls within the exact language of A. W. 37; * * * It was no part of the purpose of the authors of A. W. 70 to prevent the trial, conviction and punishment of a guilty man."

The preposterous sophistry of those "penetrating" remarks becomes glaringly apparent when we reflect that the same things might be said with relation to the otherwise fair and valid trial, conviction and sentence of an obviously guilty man by a court-martial subsequently held to have been wholly without jurisdiction on any one of the many technical but well settled grounds other than failure to comply with Article of War 70, upon which the proceedings and sentences of courts-martial have uniformly been disapproved as null and void *ab initio*.

For example, let us suppose that an accused has been tried by general court-martial with the most meticulous fairness, on grave and valid charges, convicted on competent evidence so convincing as to leave no doubt whatever of his guilt; but after receipt of the record of trial by the convening authority, it is discovered that the authority was not lawfully empowered to appoint the court. Perhaps our ingenious and penetrating reviewer of the *Brown* case could save that record also by reasoning that it was no part of the purpose of the Congress in enacting Article of War 8 to prevent the trial, conviction and punishment of a guilty man; *cry* that that Article likewise is not mandatory, and since the man is obviously guilty he has suffered only "injuria sine damno," so the sentence may be approved.

Ultimately, by extension of the same logic, we might get away from many other exacting restraints of the Articles of War.

Before leaving this interesting last phase of the *Hood* opinion, we desire to express a partial concurrence in the final statement quoted from the *Brown* case reviewer, that it was no part of the purpose of the authors of Article of

War 70, to prevent the trial, conviction and punishment of guilty men. We think it was the purpose of the Congress to prevent the unnecessary trial by general court-martial of even guilty men, i. e., where the offense is relatively minor and the case can be more wisely disposed of in some one of the other authorized ways. In the larger sense, however, we agree that the Congress had no intention whatever of preventing the trial and punishment of guilty men. But the implication of the staff judge advocate's statement as quoted in the *Flood* opinion, to the effect that the requirements of Article of War 70, if construed literally, and held mandatory, would prevent the trial and punishment of men guilty of offenses for which trial by general court-martial should be required, is wholly unreasonable and untenable. All that full compliance with the literal terms of the Article prevents in such cases is snap judgment on the question whether trial is or is not the proper action. The way to trial, conviction and punishment is left wide open, subject only to wise provisions to assure that it shall not be used unnecessarily and unwisely.

It must be remembered that the only pre-trial function wherein a soldier defendant has any rights whatsoever is under Article of War 70. If A. W. 70 means nothing, then a citizen who is a member of the United States Army must go before a court-martial which, in practice at least, is subject to the General or other in command, wherein the penalty, as in the case at bar, is death, and convictions are frequently had not because the defendant was guilty but in order to make an impression on the other men.

Justice Jackson said on the occasion of the argument of this case that he never would have found the defendant guilty on the evidence in the record. In the case at bar

the defendant was found guilty not because he was guilty but in order to impress the other men with the seriousness of the situation that existed between British civilians and American soldiers.

It never was the intention of Congress to provide naked rights for the members of the Army, which were rights in theory only, and which rights conferred in fact no privilege or right upon the soldier.

All courts have conceded that A. W. 70 was jurisdictional up to the decision in this case.

It was found as a matter of fact by the Court of Appeals that the investigation under A. W. 70 was neither thorough nor impartial. These were fundamental and basic failures to give the defendant soldier a substantial portion of his day in court. A member of the judge advocate staff in accordance with A. W. 8 was not on the bench although one was available to act as prosecutor. The defendant was represented by an air corps officer who was not skilled in law, at the trial of a capital offense, the penalty of which was either death or life imprisonment. The most important witness in the case was absent. There was no corroboration as to identity. There is serious question as a matter of law as to whether or not a rape occurred. Todd, the impartial investigator, acted in various capacities including arresting officer, committing magistrate, grand jury and, by a strange coincidence, in 1947 was attached to the Clemency Board of the army.

This case was briefed, presented and argued on the theory that A. W. 70 was a valid statute. The respondent respectfully prays that an opportunity be afforded to further brief and reargue the case on the issue as to whether

or not A. W. 79 is jurisdictional. The Government's brief in this case, while it calls the Court's attention to the fact that A. W. 79 was not jurisdictional, it was not seriously briefed, argued or entertained by any of the courts previously.

The defendant should be permitted to thoroughly brief and argue the merits of whether A. W. 79 is jurisdictional.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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